



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BOB CORBIN
XXXXXXXXXXXXXX
ATTORNEY GENERAL

January 31, 1979

**LAW LIBRARY
ARIZONA ATTORNEY GENERAL**

Mr. Clark R. Dierks
State Treasurer
State Capitol
Phoenix, Arizona

Re: I79-31 (R78-356)

Dear Mr. Dierks:

In your letter dated December 15, 1978, you asked this Office whether the State Treasurer may as part of a recently enacted deferred prosecution support program, pay a \$5,000 base amount plus the appropriate sum of matching funds, as provided in A.R.S. § 11-364, to Mohave County even though the county failed to timely comply with the statute. We conclude that Mohave County is still entitled to the funds, and that you may pay the base amount plus any appropriate matching funds.

The relevant provision of the Deferred Prosecution Plan is A.R.S. § 11-363, which reads:

§ 11-363. Participation by county; certification by state treasurer, state funding

On or before October 7, each county board of supervisors shall, by resolution, notify the state treasurer of its establishment of a program defined in § 11-361 and the amount of county funds budgeted for such a program. The state treasurer shall, upon receipt of such resolution, certify the list of counties which have voted to establish a program and shall use each county's budgeted amount to determine such county's matching fund grant pursuant to § 11-364, subsection B. The treasurer shall allocate the state funds in such amounts as provided in § 11-364, to the participating counties on or before October 31.

Mr. Clark R. Dierks
January 31, 1979
Page 2

According to the facts you provided, Mohave County passed a resolution establishing a deferred prosecution program and budgeted county funds for the program prior to October 7, 1978, but failed to forward the resolution to the Arizona State Treasurer's Office before that date. This is contrary to the requirement of A.R.S. § 11-363, which directs the County to send the Treasurer the resolution by October 7. The issue, therefore, is whether a county which fails to comply with the time requirements of the statute is precluded from receiving funds under the statute.

A.R.S. § 11-364(d) states that after fiscal year 1978-79, funds budgeted by counties for programs defined in § 11-361 shall be subject to the provisions of Title 42, chapter 2, article 4 of the Arizona Revised Statutes [hereinafter §§ 42-301 et seq.]. One of the reasons prior reliance on § 42-301 et seq. could not be made is because the remedy used for failure to comply with the statutory scheme is a reversion back to the prior year's budget. See e.g. § 42-302(F). This, of course, could not be done in the present case, where there was no program to budget in the prior year.

A.R.S. § 42-302 may be used nonetheless as an indicator of the Legislature's intent with regard to a county's failure to comply with the budget and levy requirements. Noncompliance does not elicit the drastic response by the State of refusing to levy any funds for the non-conforming county; rather, noncompliance merely limits the county's budget request to an amount no greater than it received the previous year. Because this cannot be done in the present case, and since the necessary funds remain available in the State Treasury, the Legislature's intent can best be served by paying Mohave County the base amount plus the appropriate matching fund sum.

A situation analogous to the present circumstances was the subject of appeal in Dept. of Revenue v. Southern Union Gas Co., 119 Ariz. 512, 582 P.2d 150 (1978). The issue was whether the Department of Revenue's failure to bring its case to trial within the 90-day requirement of A.R.S. 42-152(A) totally precluded the Department from bringing the action. Our Supreme Court held that the Department's noncompliance with the statute did not bar it from initiating the litigation. The Court overruled the Court of Appeal's finding that the statute was mandatory, and held that a statute, mandatory in form, may be deemed directory when the legislative purpose can best be carried out by such construction. Id at 514, 582 P.2d at 160. The Court

also stated that the effect and consequences of alternative constructions may be considered. Id. This can be done because of a basic tenet of statutory construction: a statute shall be construed in a manner which will accomplish legislative intent and avoid an absurd conclusion. Id.; Mardian Construction Co. v. Superior Court, 113 Ariz. 489, 557 P.2d 526 (1976), Osborne v. Mass. Bonding & Ins. Co., 229 F.Supp. 674 (DC Ariz., 1964).

The Court, in the Department of Revenue case, refused to hold that the mere violation of the 90-day requirement, without more, forbade proceeding with a litigation involving substantial rights of both parties: If the Legislature had intended such a drastic consequence, the Court ruled, it could have plainly spelled such out in appropriate language. Department of Revenue, supra at 514, 582 P.2d at 560.

In the present case, if the Legislature had intended to deprive a county of its deferred prosecution program funds for a failure to comply with the October 7 deadline, it could have plainly spelled it out in 11-363. Because it did not do so, construing the statute for that result would be improper. An alternative construction which would satisfy the purpose of the statutory scheme, and which is authorized under Department of Revenue, is to allow funding of a county's deferred prosecution program when the county has inadvertently run afoul of the time requirements of 11-363.

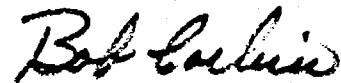
The alternative of now funding Mohave County's deferred prosecution plan is open only because sufficient funds for the base pay and matching fund allocation still remain. Because the State Treasurer is directed to disperse the funds by October 31 under 11-363, any tardy request for funds is made subject to the prerequisite that there is money remaining after the allocation deadline. Had the State Treasurer expended all the funds by October 31, as he was justified to do, Mohave County would have had no right of claim.

In summation, although failure to abide by the requirements of the Deferred Prosecution Program, including the time limits, cannot be condoned and should not be repeated, the

Mr. Clark R. Dierks
January 31, 1979
Page 4

overall purpose of the Program should not be defeated by a mere administrative error. Since there is sufficient funds to provide Mohave County with its base amount and matching funds under the Deferred Prosecution Plan, those funds should be forwarded to the county.

Sincerely,



BOB CORBIN
Attorney General

BC/mm